(1) Supreme Court, U.S.
FILED
00 9 JUNE 30 2000
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

GEMINI, INC.,

Petitioner,

v.

KATHERINE A. THORSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

TERENCE M. FRUTH
DOUGLAS L. ELSASS
FRUTH & ANTHONY, P.A.
3750 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 349-6969

WILLIAM J. KILBERG, P.C.
Counsel of Record
THOMAS G. HUNGAR
JASON C. SCHWARTZ
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Gemini, Inc.

7290

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that employers are barred from using after-acquired evidence to contest an employee's claim under the Family and Medical Leave Act.

2. Whether the court of appeals erred in upholding a challenged regulation on the ground that the authority of a federal agency to promulgate rules implementing a federal statute encompasses the power to expand the scope of the statute's coverage beyond the limits intended by Congress.

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding in the court below.

RULE 29.6 STATEMENT

Petitioner is a privately held company and has no parent corporation. No publicly held company owns ten percent or more of petitioner's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. The Family and Medical Leave Act 2

B. Factual Background 3

C. The District Court's Decision 4

D. The Court of Appeals' Decision 4

REASONS FOR GRANTING THE WRIT 6

I. Review Is Warranted Because The Lower Federal And State Courts Are Divided Over The Question Whether Employers May Use After-Acquired Evidence To Defeat An Employee's FMLA Claim 6

II. The Decision Below Is Inconsistent With Decisions Of This Court 11

III. The Question Presented Is An Important And Recurring One, And Review Is Essential To Serve The Compelling Need For Uniform Interpretation Of The FMLA 14

TABLE OF CONTENTS—Continued

Page

IV. The Court Of Appeals' Holding That Agency Rulemaking Is Not Constrained By Congressionally Established Limits Conflicts With This Court's Precedents 15

CONCLUSION 18

APPENDIX 1a

TABLE OF AUTHORITIES

CASES **Page(s)**

Anderson v. Yungkau, 329 U.S. 482 (1947) 13

Bauer v. Varity Dayton-Walther Corp., 118 F.3d 1109 (6th Cir. 1997)..... 8,9

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994)..... 16

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 15

Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 120 S. Ct. 1331 (2000) 11,12

DeLong v. Trujillo, 1 P.3d 195 (Colo. Ct. App.1999), *cert. granted* (May 30, 2000)..... 7,14

Dixon v. United States, 381 U.S. 68 (1965) 16

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568 (1988)..... 13

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 15-16

Farmers & Merchants Bank of Monroe v. Federal Reserve Bank of Richmond, 262 U.S. 649 (1923)..... 12-13

Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994)..... 11

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)..... 13

Haig v. Agee, 453 U.S. 280 (1981)..... 11

TABLE OF AUTHORITIES—Continued

Page(s)

Jones v. United States, 120 S. Ct. 1904 (2000) 13

Levers v. Anderson, 326 U.S. 219 (1945) 11

Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129 (1936) 16

Marchisheck v. San Mateo County, 4 199 F.3d 1068 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2217 (2000) 14

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 13-14

Price v. City of Fort Wayne, 117 F.3d 1022 (7th Cir. 1997) 9,10

Rust v. Sullivan, 500 U.S. 173 (1991) 13

Sims v. Alameda-Contra Costa Transit Dist., 2 F. Supp. 2d 1253 (N.D. Cal. 1998) 7,14

Sullivan v. Zebley, 493 U.S. 521 (1990) 16

Thompson v. Roe, 63 U.S. 422 (1859) 11

Thorson v. Gemini, Inc., 123 F.3d 1140 (8th Cir. 1997) 4

Thorson v. Gemini, Inc., 205 F.3d 370 (8th Cir. 2000) .. 1

Thorson v. Gemini, Inc., 998 F. Supp. 1034 (N.D. Iowa 1998), *aff'd*, 205 F.3d 370 (8th Cir. 2000) 1

United States v. Rodgers, 461 U.S. 677 (1983) 11

Victorelli v. Shadyside Hospital, 128 F.3d 184 (3d Cir. 1997) 10

TABLE OF AUTHORITIES—Continued

Page(s)

Williams v. Rubicon, Inc., 754 So. 2d 1081 (La. Ct. App. 1999), *writ denied*, 752 So. 2d 864 (La. 2000) 7,14

CONSTITUTION, STATUTES & REGULATIONS

U.S. Const. art. I, § 1 15

28 U.S.C. § 1254(1) 1

Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6, *codified at* 29 U.S.C. §§ 2601-2654 1

29 U.S.C. § 2612(a)(1)(C) & (D) 2,17,40a-41a

29 U.S.C. § 2613 ..... 11,44a-46a

29 U.S.C. § 2613(a) 2,6,13,44a

29 U.S.C. § 2613(b) 2,6,44a-45a

29 U.S.C. § 2613(c) & (d) 2,45a-46a

29 U.S.C. § 2613(c)(2) 9,10,46a

29 U.S.C. § 2613(d)(2) 3,8,13,46a

29 U.S.C. § 2615(a)(1) 3

29 U.S.C. § 2617(a) 3

29 C.F.R. § 825.100(a) (1999) 2

29 C.F.R. § 825.114(a)(2) (1993) 5

29 C.F.R. § 825.114(a)(2)(i) (1999) 5

S. REP. NO. 103-3 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3 12,17

H. REP. NO. 103-8(I) (1993) 17-18

TABLE OF AUTHORITIES—Continued

Page(s)

MISCELLANEOUS

FMLA Advisory Opinion No. 72, [1995-1999 Transfer Binder] Lab. L. Rep. (CCH) ¶32,417 (Sept. 20, 1995) 12

PETITION FOR A WRIT OF CERTIORARI

Petitioner Gemini, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App., *infra*, 1a-26a) is reported at 205 F.3d 370 (8th Cir. 2000). The opinion and order of the United States District Court for the Northern District of Iowa granting summary judgment for the respondent on the issue of liability (App., *infra*, 27a-39a) is reported at 998 F. Supp. 1034 (N.D. Iowa 1998).

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2000. App., *infra*, 1a-26a. On May 23, 2000, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including July 3, 2000. *See* Application No. 99A953. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Family and Medical Leave Act of 1993 (the "FMLA" or "Act"), Pub. L. No. 103-3, 107 Stat. 6, *codified at* 29 U.S.C. §§ 2601-2654, and of the regulations promulgated thereunder, are reprinted in the Appendix pursuant to this Court's Rule 14.1(f). App., *infra*, 40a-54a.

STATEMENT OF THE CASE

The principal question presented by this case is whether the FMLA bars an employer from introducing after-acquired evidence to contradict an employee's FMLA claim merely because the employer chose not to avail itself of the certification procedure created by the

FMLA as an optional dispute-resolution mechanism. The decision below, which effectively converts the optional certification procedure into a mandatory and exclusive binding arbitration, conflicts with other circuit case law, this Court's precedents, and the language and legislative history of the Act. In addition, this case provides an opportunity for this Court to review the court of appeals' troubling and egregiously wrong conclusion that the authority of a federal agency to promulgate regulations implementing a federal statute encompasses the power to expand the scope of the statute beyond the limits envisioned by Congress.

A. The Family and Medical Leave Act

The FMLA gives eligible employees of covered employers the right to take job-protected unpaid leave of up to 12 weeks in any 12-month period for certain specified reasons, including (1) absences resulting from an employee's need to care for a family member suffering from a "serious health condition," and (2) absences resulting from an employee's own "serious health condition" that renders him or her unable to perform the functions of his or her job. 29 U.S.C. § 2612(a)(1)(C) & (D); 29 C.F.R. § 825.100(a)(1999). The FMLA also establishes an optional certification procedure whereby employers "may" require employees who request leave on account of a "serious health condition" to provide "a certification issued by the [appropriate] health care provider" that demonstrates the employee's entitlement to FMLA leave. 29 U.S.C. § 2613(a) & (b). If the employer elects to invoke this certification procedure, the employee "shall" provide the requested certification in a timely manner. *Id.* § 2613(a). In addition, the employer may require, at its own expense, a second medical opinion and, in the event of a conflict, a third medical opinion as well. *Id.* § 2613(c) & (d). If a third medical opinion is requested, the Act specifies that "[t]he opinion of the third health care provider . . . shall be considered to

be final and shall be binding on the employer and the employee." *Id.* § 2613(d)(2).

The FMLA renders it unlawful for any covered employer "to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the Act]." 29 U.S.C. § 2615(a)(1). Employees are authorized to bring suit to obtain double damages, equitable relief, and attorney's fees against employers who violate the Act. 29 U.S.C. § 2617(a).

B. Factual Background

Gemini is a small manufacturing company with a plant in Decorah, Iowa. Respondent Katherine Thorson worked in Gemini's shipping and packing department. App., *infra*, 2a.

Respondent left work on Wednesday, February 2, 1994, complaining of diarrhea and stomach cramps and went to see a physician. She was absent from work on Thursday and Friday, and returned to work on the following Monday, February 7, with a doctor's note stating "no work" until February 7. On February 7, respondent left work early and returned to the doctor with stomach pain. The doctor ordered tests for Friday, February 11; the tests results were normal. Respondent returned to work on Monday, February 14, with a doctor's note stating "no work" until February 14. App., *infra*, 3a.

Gemini has a "no fault" absenteeism policy that requires employees to limit their absences to five percent of their scheduled working hours in a rolling twelve-month period. On February 18, 1994, respondent was terminated by Gemini for excessive absenteeism in violation of this policy. *Id.* at 2a-3a. Thereafter, on March 9, another doctor concluded that respondent had a small hernia, mild gastritis that could be managed with antacid, and duodenitis, all stress-related. *Id.* at 3a; *see* Pet. C.A. App. 477, 483. Gemini's medical expert subsequently concluded that, during the relevant time period,

respondent was suffering from "an upset stomach . . . without any significant gastrointestinal disease or pathology" and that there was no "obvious indication as to why it would require [her] to miss work." Pet. C.A. App. 495; *see* App., *infra*, 19a.

C. The District Court's Decision

Respondent filed suit in the United States District Court for the Northern District of Iowa against Gemini asserting various claims, including a claim under the FMLA. The district court initially granted summary judgment for Gemini, concluding that respondent could not prove that her illness constituted a "serious health condition." App., *infra*, 3a-4a. That judgment was set aside and remanded for further consideration by the court of appeals. *Thorson v. Gemini, Inc.*, 123 F.3d 1140, 1141-42 (8th Cir. 1997). On remand, the district court denied Gemini's motion for summary judgment and granted summary judgment for respondent as to liability on the FMLA claim. App., *infra*, 4a. The court held that respondent's stomach illness was a "serious health condition" under the FMLA and that, as a result, her termination for excessive absences (which was based in part on absences during the period she suffered from a "serious health condition") violated the Act. *Id.* After a trial limited to damages, the court awarded respondent damages plus interest, attorneys' fees and costs. *Id.* at 5a.

D. The Court of Appeals' Decision

The court of appeals affirmed. App., *infra*, 1a-26a. The court first held that the determination whether an illness constitutes a "serious health condition" under the FMLA is a mixed question of fact and law. *Id.* at 8a. The court then concluded as a matter of law that respondent's illness satisfied the Department of Labor regulatory criteria for a "serious health condition," *id.* at 8a-19a, although the court acknowledged that "[u]nder the [Department of Labor's regulatory] definition, it is pos-

sible that some absences for minor illnesses that Congress did not intend to be classified as 'serious health conditions' may qualify for FMLA protection." *Id.* at 16a. Despite this acknowledgement, the court rejected Gemini's argument that the regulations were inconsistent with congressional intent. *Id.* at 12a-16a.

In order to constitute a "serious health condition," the regulations require that, among other things, the employee's condition must result in an "incapacity requiring absence from work." 29 C.F.R. § 825.114(a)(2) (1993); *accord* 29 C.F.R. § 825.114(a)(2)(i) (1999) (current regulation imposing same requirement). Gemini submitted medical expert opinion evidence demonstrating that respondent had suffered only from "an upset stomach" and that there was no "obvious indication as to why it would require [her] to miss work." Pet. C.A. App. 495; *see* App., *infra*, 19a. The court of appeals held that this evidence could not be considered, however, because in its view the FMLA *barred* Gemini from offering any after-acquired evidence to dispute respondent's claim that "her condition resulted in an 'incapacity requiring absence from work.'" App., *infra*, 17a. The court explained that the FMLA establishes an optional mechanism that permits employers to obtain one or more medical opinions to verify an employee's entitlement to FMLA leave. *Id.* at 18a. In the court's view, Gemini's failure to avail itself of this optional procedure precluded it from introducing after-acquired evidence to dispute the seriousness of the employee's health condition or the level of capacity of the employee during the relevant time period. *Id.* at 18a-19a.

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted Because The Lower Federal And State Courts Are Divided Over The Question Whether Employers May Use After-Acquired Evidence To Defeat An Employee's FMLA Claim

Despite the optional nature of the FMLA's certification procedure, which provides that employers "may" require employees to provide appropriate certification of their entitlement to FMLA leave (29 U.S.C. § 2613(a) & (b)), the court below held that the FMLA's certification procedure is effectively mandatory, and that employers who fail to utilize that procedure are barred from disputing an employee's claim of entitlement to FMLA leave. According to the court of appeals, once respondent had proffered notes from her physician suggesting that she not work for a short period of time, "Gemini became *obligated* either to count [respondent's] absence as FMLA leave under the 'serious health condition' provision or to follow the [optional certification] procedures set out in the statute and the regulations . . . ." App., *infra*, 17a (emphasis added). The court of appeals held that Gemini's failure to invoke the optional medical certification process at the time of respondent's absence precluded Gemini from introducing any after-acquired evidence concerning the nature of respondent's illness at the time of her absence and its impact on her ability to work. *Id.* ("It may well be that Thorson's illness did not actually require that she be absent from work, but because the company did not resort to the protections for employers provided by the FMLA to address just this sort of situa-

tion, there is no genuine issue of fact on this part of the 'serious health condition' question.").[1]

The court of appeals' holding in this regard is consistent with the approach of a number of state appellate courts in FMLA cases. In *DeLong v. Trujillo*, 1 P.3d 195, 200 (Colo. Ct. App. 1999), *cert. granted* (May 30, 2000), for example, the Colorado Court of Appeals held that an employer's failure to notify an employee "that he had provided inadequate medical certification" barred the employer from "complain[ing] of the deficiency in the medical certification" in subsequent litigation with the employee. And in *Williams v. Rubicon, Inc.*, 754 So. 2d 1081, 1084-87 (La. Ct. App. 1999), *writ denied*, 752 So. 2d 864 (La. 2000), the court extended this principle even further, holding that the failure to abide by the medical certification procedure was itself a violation of the FMLA. The employer had terminated the employee after the employee was seen on television working as a volunteer during a leave of absence, but without first invoking the medical certification procedure. *Id.*

Thus, under the rule of law adopted by the court below and applied in these other cases, employees will be conclusively deemed to have suffered from a "serious

---

[1] Similarly, in *Sims v. Alameda-Contra Costa Transit Dist.*, 2 F. Supp. 2d 1253 (N.D. Cal. 1998), the court precluded an employer from using after-acquired evidence to controvert an employee's FMLA claim. The employee had submitted an initial medical certification under the procedures of the FMLA, but the employer did not request a second medical opinion. The *Sims* court held that "an employer who denied an employee's request for leave without employing the second and third medical opinion procedures set out in section 2613 [of the Act], may [not] later challenge in a civil action under the Act the accuracy of the medical certification submitted by the employee in support of his request for medical leave." *Id.* at 1260.

health condition" even where, as here, the employer offers medical evidence sufficient to permit a finding that the employee did not in fact suffer from such a condition. The effect of this rule of law is to render the FMLA's optional medical certification procedure mandatory, because utilization of that procedure becomes the only available mechanism for contesting an employee's initial showing of possible entitlement to FMLA leave. Employers who fail to invoke the certification procedure are barred from challenging the employee's initial showing, and employers who do invoke the procedure are barred from challenging the outcome of that procedure. *See* 29 U.S.C. § 2613(d)(2) ("[t]he opinion of the third health care provider . . . shall be considered to be final and shall be binding"). Under either scenario, after-acquired evidence rebutting the employee's claim to have suffered from a serious health condition is rendered inadmissible by the rule of law adopted by the court below.

Other courts of appeals, by contrast, have adopted a contrary approach that does not compel employers to invoke the certification procedure in every case on pain of waiving the right to dispute the existence of a "serious health condition." In *Bauer v. Varity Dayton-Walther Corp.*, 118 F.3d 1109 (6th Cir. 1997), for example, the Sixth Circuit rejected the notion that an employer who does not invoke the optional medical certification procedure is barred from introducing after-acquired evidence of the employee's medical condition during subsequent FMLA litigation. The employee in *Bauer*, like respondent here, was terminated for excessive absenteeism under the terms of the employer's "no fault" attendance policy. *Id.* at 1110. The employee had provided only a hospital pre-admission slip and a prescription for medication to the employer, and the employer elected not to invoke the FMLA's medical certification process. *Id.* The employee sought to exclude after-acquired evidence demonstrating that he had not missed any work due to illness with a subsequent employer, and that he had not

sought medical treatment subsequent to his discharge. *Id.* at 1112. The Sixth Circuit expressly rejected the employee's assertion "that such after-acquired evidence should not be considered by the court," however, explaining that "the plaintiff has the burden to establish the objective existence of a serious health condition, and subsequent developments are relevant to such an objective inquiry." *Id.*

Similarly, in *Price v. City of Fort Wayne*, 117 F.3d 1022, 1027 (7th Cir. 1997), the court of appeals opened the door to the use of after-acquired evidence to dispute the existence of the employee's alleged "serious health condition." In *Price*, the employee had completed the employer's leave request form and attached a doctor's note at the time she requested leave. *Id.* at 1025. The court of appeals treated the employee's leave request form and doctor's note as an initial medical certification under the FMLA's optional dispute resolution procedure. *Id.* at 1026-27. Upon receipt of the leave request, the employer requested what the court characterized as a second opinion under the dispute resolution mechanism. *Id.* The court held that this request was invalid, however, because it impermissibly directed the employee to obtain the second opinion from an employer-associated doctor, in violation of the certification procedure's requirement that the medical professional providing the second opinion "*shall not be employed on a regular basis by the employer.*" *Id.* (citing 29 U.S.C. § 2613 (c)(2)).

Thus, the *Price* court was faced with a situation in which the employee had provided an initial medical certification, and the employer had not properly rebutted that certification pursuant to the optional dispute resolution mechanism of the FMLA. Under the rationale adopted by the court of appeals below, this would have been the end of the inquiry: The employer would have been precluded from introducing evidence to challenge the employee's assertion of a "serious health condition,"

and summary judgment on that issue would be appropriate. Instead, however, the *Price* court remanded to the district court for resolution of the "serious health condition" question, explaining that "disputed material questions of fact" regarding "[the employee's] medical condition require[d] further development to determine if she suffered from a 'serious health condition.'" 117 F.3d at 1027. Thus, the Seventh Circuit's holding in *Price* is irreconcilable with the rule of law adopted by the court of appeals in this case.[2] *See also Victorelli v. Shadyside Hospital*, 128 F.3d 184 (3d Cir. 1997) (remanding for further proceedings to resolve factual question whether plaintiff suffered from "serious health condition" despite employer's evident failure to invoke the Act's certification procedure).

As these cases demonstrate, there is a widening division of authority among the lower state and federal courts over the first question presented in this case. This Court's review is necessary to resolve this conflict and provide a clear rule to guide federal and state courts considering the admissibility of after-acquired evidence in FMLA cases and the significance, if any, to be accorded an employer's failure to invoke or complete the optional certification process.

---

[2] The *Price* court excluded from consideration the proffered medical opinion of the employer-associated doctor, but not because that opinion constituted after-acquired evidence. Rather, the court held the opinion was improper under the requirements of the medical certification procedure. 117 F.3d at 1026-27 (citing 29 U.S.C. § 2613(c)(2)). The court's remand order necessarily contemplated the use of after-acquired evidence to resolve the fact issues relating to the "serious health condition" question, despite the employer's failure to invoke the certification procedure in a valid manner. *See id.* at 1027.

II. The Decision Below Is Inconsistent With Decisions Of This Court

As noted above, the Act provides that the certification procedure "*may*" be invoked by employers (*see* 29 U.S.C. § 2613 (emphasis added)), but the effect of the rule of law adopted by the court of appeals is to transform the optional certification procedure into a mandatory and exclusive dispute resolution process that provides the sole mechanism for contesting a claimed "serious health condition." This interpretation of the Act is in direct conflict with the "common-sense principle of statutory construction" announced by this Court in *United States v. Rodgers*, 461 U.S. 677, 706 (1983), that "[t]he word 'may,' when used in a statute, usually implies some degree of discretion." This rule of statutory interpretation has been repeatedly reaffirmed by this Court. *See, e.g., Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 120 S. Ct. 1331, 1336 (2000); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994) ("The word 'may' clearly connotes discretion."); *Haig v. Agee*, 453 U.S. 280, 294 n.26 (1981) (the word "'may' expressly recognizes substantial discretion"); *Levers v. Anderson*, 326 U.S. 219, 223-24 (1945) (holding that the word "may," as used in a Treasury regulation, did not mean "must").

To be sure, there are narrow and limited exceptions to this "common-sense principle of statutory construction." *Rodgers*, 461 U.S. at 706. The rule "can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute[.]" *Id.* The rule can be defeated only in an extraordinary case, however. *See Thompson v. Roe*, 63 U.S. 422, 434 (1859) (rejecting argument that "may" should be read as "must," holding that "[i]t is only where it is necessary to give effect to the clear policy and intention of the Legislature, that such a liberty can be taken with the plain words of a statute"). Accordingly, an examination of legislative history and "atten-

tion to practical consequences" can aid the inquiry as to whether the extraordinary circumstances required to deviate from the general rule are present in any given case. *See, e.g., Cortez Byrd Chips*, 120 S. Ct. at 1336-39 (analyzing the "[s]tatutory history" and "practical consequences" and concluding that a permissive interpretation of the word "may" was required).

In this case, neither the legislative history nor a consideration of "practical consequences" suggests that the FMLA falls into the extraordinary category of a statute in which "may" means "must." Indeed, the legislative history is consistent with the view that invocation of the certification procedure is a discretionary option, rather than the sole mechanism for disputing an employee's FMLA claim. *See, e.g.*, S. REP. NO. 103-3, at 26 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 28 ("If an employee requests leave because of a serious health condition or to care for a family member with a serious health condition, an employer *may* require that the request be supported by a certification . . . .") (emphasis added); *id.* at 44 ("An employer *may* require medical certification . . . .") (emphasis added). The Wage and Hour Division of the Employment Standards Administration of the U.S. Department of Labor, which has regulatory authority over the Act, has characterized these provisions in a similar fashion. FMLA Advisory Opinion No. 72, [1995-1999 Transfer Binder] Lab. L. Rep. (CCH) ¶32,417 (Sept. 20, 1995) ("FMLA's medical certification provisions *allow* an employer to request that leave for [a] serious health condition '. . . be supported by a certification issued by the health care provider . . .' of the employee or family member.") (emphasis added).

Significantly, moreover, this Court has held that the use of the words "may" and "shall" in the same statute compel the conclusion that Congress intended to provide options where it used "may," and to mandate action only where it used "shall." *See, e.g., Farmers & Merchants Bank of Monroe v. Federal Reserve Bank of Richmond*,

262 U.S. 649, 663 (1923) ("This statute appears to have been drawn with great care. Throughout the act the distinction is clearly made between what the Board and the reserve banks 'shall' do and what they 'may' do."); *see also Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("And when the same Rule uses both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory."). Section 2613 of the Act, of course, carefully distinguishes between the initiation of the certification procedure, which the employer "may" choose to invoke (29 U.S.C. § 2613(a)), and those obligations and consequences that Congress intended to be mandatory. *E.g.*, 29 U.S.C. § 2613(a) ("[t]he employee *shall* provide" certification upon request) (emphasis added); *id.* § 2613(d)(2) ("[t]he opinion of the third health care provider . . . *shall* be considered to be final") (emphasis added).

Thus, the court of appeals' decision conflicts with this Court's clear dictates concerning the significance to be accorded Congress' use of the term "may" in a federal statute. Moreover, the decision below also violates this Court's repeated admonition that "'[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'" *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (citations omitted); *see, e.g., Jones v. United States*, 120 S. Ct. 1904, 1908-09 (2000); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The court of appeals' interpretation of the FMLA raises serious constitutional questions under both Article III and the Seventh Amendment, because it effectively deprives employers of their right to have a key issue in FMLA damages actions—*i.e.*, whether an employee in fact suffered from a "serious health condition"—be presented to and resolved by the factfinder in an Article III court. *See, e.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Northern Pipeline Constr. Co. v. Marathon Pipe*

Line Co., 458 U.S. 50 (1982). Accordingly, the decision below conflicts with this Court's precedents, and certiorari should be granted to resolve the conflict.

III. The Question Presented Is An Important And Recurring One, And Review Is Essential To Serve The Compelling Need For Uniform Interpretation Of The FMLA

The principal question presented in this petition, *i.e.*, whether an employer is precluded during litigation with a former employee from introducing after-acquired evidence concerning the existence of a "serious health condition," raises an important and recurring issue. Like the present case, many cases arising under the FMLA focus on whether an individual suffers from a "serious health condition." The extent, if any, to which employers can offer after-acquired evidence to rebut a plaintiff's initial showing is therefore of critical importance. Equally weighty is the closely intertwined question of the significance, if any, to be accorded an employer's failure to invoke the optional medical certification process, an issue that arises frequently in FMLA litigation in both state and federal courts. *See, e.g.*, *Sims*, *supra*; *DeLong*, *supra*; *Williams*, *supra*; *see also Marchisheck v. San Mateo County*, 199 F.3d 1068, 1077 (9th Cir. 1999) (discussing this issue without deciding it), *cert. denied*, 120 S. Ct. 2217 (2000). Only this Court can provide uniform guidance to the lower courts regarding these important questions.

The court of appeals' decision effectively defeats the optional nature of the certification process by forcing employers to choose between using the "optional" process or foregoing any future opportunity to dispute an employee's FMLA claim should the employee eventually file a lawsuit. That draconian and unjustifiable rewriting of a facially optional statutory procedure should be subjected to plenary review and scrutiny by this Court.

IV. The Court Of Appeals' Holding That Agency Rulemaking Is Not Constrained By Congressionally Established Limits Conflicts With This Court's Precedents

The court of appeals upheld the Department of Labor's regulatory definition of "serious health condition" despite the court's recognition that "[u]nder the DOL's definition, it is possible that some absences for minor illnesses that Congress did not intend to be classified as 'serious health conditions' may qualify for FMLA protection." App., *infra*, 16a. In the court's view, the agency's decision to expand the coverage of the FMLA beyond the limits intended by Congress was "reasonab[e]" because the expanded scope of employer liability was "a legitimate trade-off" for the clarity of a bright-line rule that can be "uniformly" applied. *Id.*

Under the rule adopted by the court of appeals, therefore, agencies are given *carte blanche* to expand the scope of regulatory statutes beyond the limits envisioned by Congress, as long as the regulatory expansion can be justified on grounds of clarity or ease of application. That approach to judicial review of agency rulemaking is irreconcilable with numerous precedents of this Court, which make clear that the ultimate touchstone and absolute limit of regulatory authority is the intent of Congress.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), for example, this Court held that when Congress has made its intent plain, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. That basic limitation on the rulemaking power of federal agencies is derived from the bedrock separation-of-powers principle that "All legislative powers ... granted [in the Constitution] shall be vested in a Congress of the United States," not in unelected Executive Branch officials. U.S. CONST. art. I, § 1. As this Court explained in *Ernst*

& Ernst v. Hochfelder, 425 U.S. 185 (1976), "[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is "'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Id.* at 213-14 (quoting *Dixon v. United States*, 381 U.S. 68, 74 (1965) (quoting *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936))). *Accord, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994).

This Court's precedents also foreclose the court of appeals' reliance on clarity and administrative convenience as permissible grounds for an agency's failure to abide by congressional intent. Indeed, precisely that issue was presented in *Sullivan v. Zebley*, 493 U.S. 521 (1990), which involved a challenge to the Secretary of Health and Human Services' regulatory definition of "disabled." In order to "'streamlin[e] the decision process'" regarding disability status and to "'provide a means to efficiently and equitably evaluate'" disability claims, the Secretary's regulation established rigid, bright-line rules for determining the disability status of children. *Id.* at 532-34 (citations omitted). The Secretary's bright-line rules, while administratively convenient, did not achieve the result envisioned by Congress in some instances. *Id.* at 528-36. The Court accordingly struck down the regulation as "'manifestly contrary to the statute'" (*id.* at 541 (citation omitted)), notwithstanding the Secretary's argument that use of the bright-line rules was "the only practicable way to" make the disability determinations at issue. *Id.* at 539.

In this case, as the court of appeals recognized below (App., *infra*, 16a), the Department of Labor's regulatory definition expands the scope of the phrase "serious health condition" beyond the limits intended by Congress, simply for reasons of convenience and ease of application. According to the court of appeals' reading

of the regulation, any health condition, no matter how minor, qualifies as a "serious health condition" as long as it results in more than three days of incapacity and more than one visit to a health care provider. *Id.* at 10a, 13a-17a. That conclusion is inconsistent with the statutory text, which requires that the health condition be "serious," not minor. 29 U.S.C. § 2612(a)(1)(C) & (D); *see* App., *infra*, 13a ("it may be that [respondent's] condition was not 'serious' in the usual sense of the word"). Moreover, the court of appeals' conclusion is also irreconcilable with the legislative history of the FMLA. Indeed, the final Senate Report on the Act squarely rejected the overly broad view of "serious health condition" that was adopted by the Department of Labor in its regulations and approved by the court below:

> The term "serious health condition" *is not intended to cover short-term conditions for which treatment and recovery are very brief*. . . . Conditions or medical procedures that would not normally be covered by the legislation include *minor illnesses which last only a few days* and surgical procedures which typically do not involve hospitalization and require only a brief recovery period.

S. REP. NO. 103-3, at 28 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 30 (emphases added); *see also* H. REP. NO. 103-8(I), at 40 (1993) (same).

Similarly, the Senate Report provided a lengthy list of examples of the types of medical conditions that Congress expected to qualify as "serious health condition[s]," including "heart attacks, heart conditions requiring heart bypass o[r] valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job," and the like. S. REP. NO. 103-3, *supra*, at 29; *accord* H. REP. NO. 103-8(I),

supra, at 40. Needless to say, the mild upset stomach and diarrhea suffered by respondent are qualitatively different from the types of health conditions included in this list, and the court of appeals did not even question that proposition. Instead, the court blindly deferred to the regulatory definition despite its concession that the regulation could sweep within the coverage of the FMLA "some absences for minor illnesses that Congress did not intend to be classified as 'serious health conditions.'" App., *infra*, 16a. That extension of judicial deference to an agency's clear departure from congressional intent contravenes the principles announced by this Court in the cases cited above, and is therefore worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

TERENCE M. FRUTH
DOUGLAS L. ELSASS
FRUTH & ANTHONY, P.A.
3750 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 349-6969

WILLIAM J. KILBERG, P.C.
Counsel of Record
THOMAS G. HUNGAR
JASON C. SCHWARTZ
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Gemini, Inc.

June 30, 2000